HARIRAM JAYARAM & ORS

v.

SENTUL RAYA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S5-24-1213-2002]
21 OCTOBER 2002

LAND LAW: *Housing developers - Sale and purchase agreement - Non-delivery of vacant possession - Damages - Claim for - Whether purchasers prevented from claiming damages - Whether to rescind contract before making claim - Contracts Act 1950, s. 56(3) - Whether claim allowed under Housing Developers (Control and Licensing) Act 1966*

STATUTORY INTERPRETATION: *Cannons of construction - Generalia specialibus non derogant - Sale and purchase of land agreement - Whether Contracts Act 1950 applicable - Whether Housing Developers (Control and Licensing) Act 1966 governing statute - Whether specific laws ought to be applied as opposed to general legislation*

CONTRACT: *Housing development contract - Breach - Non-delivery of vacant possession - Damages - Claim for - Notice to claim compensation - Absence of - Whether purchasers prevented from claiming damages - Whether to rescind contract before making claim - Contracts Act 1950, s. 56(3) - Whether applicable*

The defendant, a housing developer, entered into a sale and purchase agreement with the plaintiffs for the purchase of condominium units. The plaintiffs claimed that the defendant had breached this agreement when it failed to deliver vacant possession of the said units on the respective dates. They applied to this court *vide* encl. 1 for liquidated ascertained damages for non-delivery of vacant possession.

Relying upon s. 56(3) of the Contracts Act 1950, the defendant argued that the plaintiffs could not claim for damages as they did not give the defendant any notice regarding their claim.

Held:

[1] Where there are two provisions of written law, one general and the other specific, then whether or not the specific legislation came into existence subsequent to the general legislation or *vice versa*, the specific legislation or the special provision in the specific legislation would exclude the operation of the general legislation. The Contracts Act 1950 is a piece of legislation of a general nature setting out the general law governing contracts between parties, whereas the Housing Developers (Control and Licensing) Act 1966 specifically governed the sale of houses by a licensed developer. The plaintiffs' claims were based, not on general contract but on the standard sale and purchase agreements in accordance with Schedule 'H' to the Housing Developers (Control and Licensing) Regulations 1989 which were made under the Housing Developers (Control and Licensing) Act 1966. Being a specific piece of local legislation, enacted solely to protect house buyers from unscrupulous developers, the standard sale and purchase agreements signed by the plaintiffs must take precedence over the Contracts Act 1950 and must be given effect accordingly. (pp 814 a-d, 816 f-h & 823 e-f)

[2] A purchaser is not obliged to refer to the Contracts Act 1950 before deciding to claim for liquidated ascertained damages against the developer for non-delivery of vacant possession at the original completion date. It would be certainly erroneous in the extreme to burden the purchasers with the requirement of s. 56(3) of the Contracts Act 1950 when the Housing Act and the Housing Regulations do not impose such a burden. Such attempts would taint and remove the very protection afforded by the relevant laws enacted by Parliament. (p 818 c-e & g-h)

[2a] Section 56(3) of the Contracts Act 1950 would apply only where the plaintiffs as the purchasers had indicated to the defendant developer when the contracts became voidable and that would be on the original completion dates or soon thereafter. Here, there was no evidence of any indication by the plaintiffs and for that reason the said section would not apply. The terms of the sale and purchase agreement were clear and unambiguous which accorded the plaintiffs with the right to sue for liquidated ascertained damages without the need to rescind the said agreement. (p 821 a-b)

[3] Ought a developer intend to absolve itself from liability arising from late delivery, reg. 11 of the Housing Regulations provides that an application could be made to the Controller of Housing to detract from

the express provisions of the sale and purchase agreement, owing to some special circumstances or hardship. Whilst such an avenue was open to the defendants in the present case, they did not attempt to pursue it. (p 820 d)

[Claim for damages as per encl. 1 allowed.]

Case(s) referred to:

Ashmore v. Corp of Lloyd's (No 2) [1992] 2 Lloyds Rep 620 ***(refd)***
Australian Meat Industry Employees' Union v. Frugalis Pty Ltd [1990] 2 Qd R 201 ***(refd)***
Australian Mutual Provident Society v. 400 St Kilda Road Pty Ltd [1991] 2 VR 417 ***(refd)***
Bell v. Lever Bros Ltd [1932] AC 161 ***(refd)***
Blacktown Municipal Council v. Doneo [1971] 1 NSWLR 157 ***(refd)***
Buche v. Box Pty Ltd [1993] 31 NSWLR 368 ***(refd)***
City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 CLJ 131; [1985] CLJ (Rep) 77 ***(refd)***
City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69 ***(refd)***
David Leahey (Aust) Pty Ltd v. McPherson's Ltd [1991] 2 VR 367 ***(refd)***
Dickstein v. Kanevsky [1947] VLR 216 ***(refd)***
Federation Insurance Ltd v. Wasson [1987] 163 CLR 303 ***(refd)***
Folin & Brothers Sdn Bhd v. Wong Foh Ling & Wong Swee Lin & Ors [2001] 1 CLJ 604 ***(refd)***
GSA Group Pty Ltd v. Siebe Plc [1993] 30 NSWLR 573 ***(refd)***
Heimann v. Commonwealth [1938] 38 SR (NSW) 691 ***(refd)***
Hindustan Construction Co v. The State of Bihar AIR [1963] Patna 254 ***(refd)***
Himbleton Pty Ltd v. Kumagai (NSW) Pty Ltd [1991] 29 NSWLR 44 ***(refd)***
Hock Huat Iron Foundry (suing as a firm) v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 ***(refd)***
Hospital Products Ltd v. United States Surgical Corp [1984] 156 CLR 41 ***(refd)***
Hughes v. Greenwich London Borough Council [1994] 1 AC 170 ***(refd)***
Hughes v. Western Australian Cricket Assn (Inc) [1986] 19 FCR 10 ***(refd)***
Ian Delbridge Pty Ltd v. Warrabdyte High School Council [1991] 2 VR 545 ***(refd)***
Kang Yoon Mook Xavier v. Insun Development Sdn Bhd [1995] 2 CLJ 471 ***(refd)***
Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 335 ***(refd)***
Lewis v. Bell [1985] 1 NSWLR 731 ***(refd)***
Liverpool City Council v. Irwin [1977] AC 239 ***(refd)***
Luxor (Eastbourne) Ltd v. Cooper [1941] AC 108 ***(refd)***
Nutting v. Baldwin [1995] 2 All ER 321 ***(refd)***
Peters American Delicacy Co Ltd v. Champion [1928] 41 CLR 316 ***(refd)***
Prime Holdings Pty Ltd v. Kanemary [1992] 7 WAR 308 ***(refd)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 ***(refd)***
Re Wong Chong Siong; ex p Arab Malaysian Finance Bhd [1999] 1 CLJ 222 ***(refd)***

Reigate v. Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592 ***(refd)***
Sakinas Sdn Bhd v. Siew Yik Hau & Anor [2002] 3 CLJ 275 ***(refd)***
SEA Housing Corporation Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 ***(refd)***
Stock v. Frank Jones (Tipton) Ltd [1978] 1 WLR 231 ***(refd)***
Sun Alliance Pensions Life & Investments Services Ltd v. RJL [1991] 2 Lloyds Rep 410 ***(refd)***
Wasson v. Commercial and General Acceptance Ltd [1985] 2 NSWLR 206 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 176
Contracts Act 1950, ss. 47, 56(1), (3)
Housing Developers (Control and Licensing) Act 1966, ss. 3, 11, 12, 24, 65
Housing Developers (Control and Licensing) Regulations 1989, reg. 11(3)
Interpretation Acts 1948 and 1967, ss. 17A, 87(d), Part II

Contract Act [India], s. 55

Other source(s) referred to:
FAR Bennion, *Statutory Interpretation, "A Code"*, 3rd edn, p 174

For the plaintiffs - NV Sree Harry; M/s Sri Ram & Co
For the defendant - Michael KT Chow; M/s Logan Sabapathy & Co

Reported by M Maheswaran

JUDGMENT

Abdul Malik Ishak J:

The Facts

This was an interesting case. I was told that I am breaking new ground. By way of an originating summons in enclosure one (1), the plaintiffs sought for the following prayers:

(a) that the Defendant pay the Plaintiffs liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price arising from the Defendant's failure to hand over vacant possession of the condominium units to the Plaintiffs within the time prescribed in the respective Sale and Purchase Agreements;

(b) that the Defendant pay the Plaintiffs liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price arising from the Defendant's failure to complete the common facilities within the time prescribed in the respective Sale and Purchase Agreements;

(c) a declaration that the Plaintiffs are entitled to set-off the remaining purchase price to be paid to the Defendant against such liquidated damages found due from the Defendant to the Plaintiffs under (a) and (b) above;

(d) an Order for payment by the Defendant to the Plaintiffs of all sums found to be due from the Defendant to the Plaintiffs after having set-off the remaining purchase price to be paid to the Defendant against the liquidated damages found due under (a) and (b) above;

(e) that the Defendant pay the Plaintiffs liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the date of this Order to the date of actual delivery of vacant possession of the condominium units to the Plaintiffs;

(f) that the Defendant pay the Plaintiffs liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price from the date of this Order to the date of actual completion of the common facilities;

(g) interest;

(h) costs; and

(i) such other and further reliefs as this Honourable Court deems proper and just.

The facts were quite simple and straightforward. By the sale and purchase agreements made between the plaintiffs and the defendant, the plaintiffs agreed to purchase condominium units from the defendant – the developer. The sale and purchase agreements were in accordance with Schedule "H" to the Housing Developers (Control and Licensing) Regulations, 1989 which were in turn made under the Housing Developers (Control and Licensing) Act 1966.

By cll. 22(1) and 24(1) of the sale and purchase agreements, the defendant agreed to hand over vacant possession of the condominium units to be erected by the defendant to the plaintiffs and the defendant too agreed to complete the common facilities within thirty six (36) calendar months from the date of the sale and purchase agreements. Clause 7 of the sale and purchase agreements stipulate, as an express term, that time should be deemed to be the essence of the contract. By cl. 22(2) of the sale and purchase agreements, it was an express term that if the defendant failed to hand over vacant possession of the condominium units within the thirty six (36) calendar months, the defendant shall pay immediately to the plaintiffs liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price. By cl. 24(2) of the sale and purchase agreements, it was an express term that if the defendants failed to complete the common

facilities within the thirty six (36) months, the defendant shall pay immediately to the plaintiffs liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price. Sadly, thirty six (36) months have past and gone and the defendant has yet to hand over vacant possession of the condominium units to the plaintiffs and to complete the common facilities. For these reasons, and relying on cll. 22 and 24 of the sale and purchase agreements, the plaintiffs said that the defendant was liable to pay the plaintiffs a total sum of RM1,592,074.89 as liquidated damages calculated up to the date of the originating summons as per enclosure one (1) and continuing.

Now, pursuant to cl. 22 of the sale and purchase agreements, the particulars of the liquidated damages were itemised as follows:

	Lot No	Date of Sale & Purchase Agreement	Purchase Price (RM)	Delivery Date for Vacant Possession	LAD As at 28.3.02 (RM)
1st Plaintiff	CIB/15/1	23.9.1995	286,868.00	23.9.1998	100,836.07
2nd and 3rd Plaintiffs	CIA/5/4	27.9.1995	246,856.00	27.9.1998	86,501.05
4th Plaintiff	CID/2/7	24.7.1996	395,268.00	24.7.1999	106,018.46
5th Plaintiff	CIA/15/3	21.9.1995	281,070.00	21.9.1998	98,952.04
6th Plaintiff	CIC/3/6	19.8.1996	521,560.00	19.8.1999	136,177.17
7th Plaintiff	CIA/6/2	24.9.1995	218,475.00	24.9.1998	76,735.60
8th Plaintiff	CIA/18/1	22.12.1995	290,928.00	22.12.1998	95,089.62
9th Plaintiff	CIA/12/6	21.9.1995	266,903.00	21.9.1998	93,964.48
10th Plaintiff	CIA/22/4	11.11.1996	399,768.00	11.11.1999	95,177.64
11th Plaintiff	CIA/18/3	16.10.1995	296,176.00	16.10.1998	102,241.58
12th and 13th Plaintiffs	CIB/19/4	25.11.1995	321,115.00	24.11.1998	107,419.57
14th Plaintiff	CIB/22/4	8.8.1996	335,756.00	8.8.1999	88,676.38
15th Plaintiff	CID/2/8	23.9.1995	395,268.00	23.9.1998	138,939.41
Total Amount due and Owing to the Plaintiff(s) under Clause 22					**1,362,729.07**

Whereas, pursuant to cl. 24 of the sale and purchase agreements, the particulars of the liquidated damages were listed in these fashions:

	Lot No	Date of Sale & Purchase Agreement	Last 20% of the Purchase Price (RM)	Completion Date for the Common Facilities	LAD As at 28.3.02 (RM)
1st Plaintiff	CIB/15/1	23.9.1995	57,373.60	23.9.1998	20,167.21
2nd and 3rd Plaintiffs	CIA/5/4	27.9.1995	49,371.20	27.9.1998	17,300.21
4th Plaintiff	CID/2/7	24.7.1996	79,053.60	24.7.1999	21,203.69
5th Plaintiff	CIA/15/3	21.9.1995	56,214.00	21.9.1998	19,790.41
6th Plaintiff	CIC/3/6	19.8.1996	104,312.00	19.8.1999	27,235.43
7th Plaintiff	CIA/6/2	24.9.1995	43,695.00	24.9.1998	15,347.12
8th Plaintiff	CIA/18/1	22.12.1995	58,185.60	22.12.1998	19,017.92
9th Plaintiff	CIA/12/6	21.9.1995	53,380.60	21.9.1998	18,792.90
10th Plaintiff	CIA/22/4	11.11.1996	79,953.60	11.11.1999	19,035.53
11th Plaintiff	CIA/18/3	16.10.1995	59,235.20	16.10.1998	20,448.31
12th and 13th Plaintiffs	CIB/19/4	25.11.1995	64,223.00	24.11.1998	21,483.91
14th Plaintiff	CIB/22/4	8.8.1996	67,151.20	8.8.1999	17,735.28
15th Plaintiff	CID/2/8	23.9.1995	79,053.60	23.9.1998	27,787.88
Total Amount due and Owing to the Plaintiffs under Clause 22					**265,345.82**

The defendant acted swiftly and through Hamidah binti Maktar ("Hamidah") filed an affidavit in reply styled as the defendant's first affidavit as seen in encl. 4. There she categorically averred to the salient facts. As one of the directors of the defendant's company she had access to the defendant's files containing the respective documents of all the plaintiffs and with that advantage she categorically stated that the eighth (8th) plaintiff had by his letters dated 18 October 1999 and 24 April 2001 sought to rescind his sale and purchase agreement with the defendant. Hamidah then averred that the ninth (9th) plaintiff was in default of his stage 6 progress payment in the sum of RM24,021.27 which was due on 26 January 1998 and that by letter dated

24 September 2001, the defendant had given him notice of such default but the ninth (9th) plaintiff refused to remedy the default. In regard to the eleventh (11th) plaintiff, the defendant had by letter dated 24 September 2001 terminated his sale and purchase agreement on the basis of his failure to pay the outstanding progress payments. The defendant's records showed that the 1st, 2nd, 4th, 6th, 9th, 10th, 12th and 13th plaintiffs had previously given notices of their intentions to claim liquidated damages against the defendant for late delivery, and that with the exception of the 6th plaintiff, the other plaintiffs' notices were generally given well after the expiry of the respective times limited for delivery of vacant possession. That save for these named plaintiffs – referring to the 1st, 2nd, 4th, 6th, 9th, 10th, 12th and 13th plaintiffs, the defendant's records did not have the requisite notices from the other plaintiffs of their intentions to claim such liquidated damages or that they in any way agitated the issue of completion.

Hamidah then went into specifics. She averred that the defendant is, and was at all material times, a joint venture vehicle of Keretapi Tanah Melayu Berhad ("KTMB") and YTL Land & Development Berhad (formerly known as Taiping Consolidated Berhad) ("YTL Land"). That YTL Land is a public listed company set up for the purpose of developing a development known as Sentul Raya Development which include the portion of the development wherein various sale and purchase agreements were entered into by the plaintiffs. It was averred by Hamidah that the delay in the completion of the plaintiffs' respective units were due to the economic downturn of the country in 1997 to 1998 beyond the defendant's control which seriously affected the financial position of YTL Land and in turn that of the defendant with the result that, as each of the plaintiffs were aware, all works on the Sentul Raya Development came to a stop in January 1998. Hamidah further averred that in fact, many of the purchasers of the defendant's developments who had obtained financing to effect their purchases also had their financing facilities frozen thereby affecting their ability to settle their progress billings. As a result thereto, it was averred that YTL Land has had to undertake a scheme of arrangement pursuant to s. 176 of the Companies Act 1965 which scheme was also sanctioned by the Kuala Lumpur High Court in 2001 as seen in suit No: D7-26-2-2001. It was averred that upon the finalisation of the restructuring exercises that it was possible for the defendant to continue with the development of the Sentul Raya Development as a whole. The restructuring exercises included:

(a) a restructuring of the underlying project agreements with KTMB in respect of Sentul Raya Development which was subject to the approvals of the relevant authorities, namely, the Kuala Lumpur Stock Exchange, the Securities Commission, the Economic Planning Unit of the Prime Minister's Department and the Foreign Investment Committee; and

(b) an injection of fresh available funds.

Hamidah averred that the subject development which included the plaintiffs' units were expected to be completed sometime in September 2002. In regard to the quantum of the liquidated damages as claimed by the plaintiffs, Hamidah had this to say. That a perusal of the liquidated damages claimed under cl. 22 of the sale and purchase agreements as against the total purchase price of all the units purchased by the plaintiffs would show that the total liquidated damages constituted about 31.17% and that the computations done by the plaintiffs were for a period up to 28 March 2002. It was categorically averred that the liquidated damages both in percentage and in absolute terms would continue to rise until the expected date of completion in September 2002. Thus, it was averred that a comparison of such a nature would show that the liquidated damages claimed did not amount to a reasonable compensation to the plaintiffs of the loss purportedly suffered by them as a result of the present delay. It was the stand of the defendant that with the re-launch of the Sentul Raya Development as a whole, the property prices of that area, including those properties purchased by the plaintiffs would improve tremendously. For these reasons, the defendant stated that the plaintiffs were not entitled to the reliefs as prayed for in the originating summons in enclosure one (1) and the defendant also prayed for the appropriate orders and directions on this matter from this court.

In the course of writing this judgment, I was advised that the eighth (8th) plaintiff had decided not to pursue with the originating summons. I merely took note of the matter.

Arguments Of The Parties

The contentions of the plaintiffs were simply that this was one of pure entitlement to liquidated ascertained damages flowing from the non-delivery of vacant possession by the defendant at the respective times limited for delivery of vacant possession ("original completion date").

In opposing the plaintiffs' application in enclosure one (1), the defendant raised two legal issues for the determination of this court, namely:

(i) Whether s. 56(3) of the Contracts Act 1950 would operate to exclude a claim for liquidated ascertained damages by reason of the failure on the part of the plaintiffs to give the relevant notices to the defendant of their intentions to claim liquidated ascertained damages at the time of acceptance of later performance?

(ii) Whether the terms of the sale and purchase agreements which were in accordance with Schedule "H" to the Housing Developers (Control and Licensing) Regulations, 1989 which were made under the Housing Developers (Control and Licensing) Act 1966 can be said to operate to entitle the plaintiffs to liquidated ascertained damages in any event despite the provisions of s. 56(3) of the Contracts Act 1950 as to the requirement of the relevant notices?

In examining these two legal issues, it would be ideal to reproduce verbatim s. 56 of the Contracts Act 1950 and that section enacts as follows:

> **Effect of failure to perform at fixed time, in contract in which time is essential**
>
> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> **Effect of failure when time is not essential**
>
> (2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.
>
> **Effect of acceptance of performance at time other than that agreed upon**
>
> (3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.

Anant Singh J speaking for the Indian Supreme Court in the case of *Hindustan Construction Company v. The State of Bihar* [1963] AIR Patna 254 particularly at p. 258 to p. 259 of the report, had this to say in regard to the requirement of extending a notice in the context of a voidable contract where time was the essence of the contract:

(14) The law on time being of the essence of the contract is to be found in Section 55 of the Indian Contract Act, which is as follows:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> It will be noticed, even such a contract, when time is of the essence of the contract, is only voidable at the option of the promisee and does not come to an end by itself after the expiry of the period. The promisee has to terminate it by proper notice, as provided in section 65 of the Act, otherwise the option to avoid the contract will be deemed to have been waived and the contract subsisting.

It can readily be appreciated that the equivalent of s. 55 of the Indian Contract Act is our s. 56 of the Contracts Act 1950. Now, in the context of the present case, time was provided under the sale and purchase agreements between the parties to be of the essence and this can be seen in cl. 7 of the sale and purchase agreements which states as follows:

> Time shall be the essence of the contract in relation to all provisions of this Agreement.

That being the case, Mr. Michael K.T. Chow – the learned counsel for the defendant, submitted that at the expiry of the period of performance (which would be on the original completion date) then the plaintiffs had, under s. 56(1) of the Contracts Act 1950, the options to either terminate the sale and purchase agreements or to continue with it. Mr. Michael K.T. Chow submitted that if the plaintiff had chosen to terminate the sale and purchase agreements, then the plaintiffs ought to give to the defendant proper and express notices of termination. Mr. Michael K.T. Chow heavily relied on the case of *Hindustan Construction Company v. The State of Bihar (supra)* to drive home the message that the sale and purchase agreements did not automatically come to an end by itself just by reason of the expiry of the original completion dates. So it was pointed out that unless the plaintiffs had given the defendant the proper and express notices of termination as required, then the defendant was entitled to assume that the plaintiffs had waived their options to avoid the sale and purchase agreements and that agreements continued to subsist. Once that happened as it did here, and the parties did not fix a fresh time for completion then, according to Mr. Michael K.T. Chow, time became at large. It was because of this that it was submitted that the defendant was entitled to rely on s. 47 of the Contracts Act 1950 and this meant that the

defendant was allowed a leeway to complete the development of the condominium units within a reasonable time. In short, a reasonable time will be accorded to the defendant to complete the sale and purchase agreements with the plaintiffs. Section 47 of the Contracts Act 1950 enacts as follows:

> **Time for performance of promise where no application is to be made and no time is specified**
>
> Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.
>
> *Explanation – The question 'what is a reasonable time' is, in each particular case, a question of fact.*

and the ramifications of this section can be seen in the case of *Hock Huat Iron Foundry (suing as a firm) v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89 where NH Chan JCA writing a separate judgment for the Court of Appeal aptly said (see p. 106 of the report):

> Therefore, since time was no longer of the essence of the contract by the defendant's waiver of it by allowing time to pass, the contract could no longer be avoided under s. 56(1). However, since the plaintiff now had a reasonable time (s. 47) to complete the project, compensation could not be awarded for delay. This is because there could not be any delay as the plaintiff had a reasonable time to complete and in fact, was allowed to complete the project.

Flowing from all these arguments and applying them to the facts of the present case, it was vigorously submitted that as the plaintiffs had allowed time to pass beyond the original completion dates without raising a whimper, then it must follow that the plaintiffs must have affirmed the sale and purchase agreements. This meant that time was no longer of the essence and that the defendant now had a reasonable time to complete the condominium units and that no liquidated ascertained damages could be awarded for the delay. It was also submitted that by virtue of s. 56(3) of the Contracts Act 1950 that unless the plaintiffs had given the defendant the relevant notices of their intentions to accept a later performance of the sale and purchase agreements, the plaintiffs were not entitled to claim compensations for the delay. This meant that the plaintiffs must have agreed that the defendant may perform their promise at some other time, which has to be at a time later than what the plaintiffs had so agreed – that is to say when performance has not been completed yet. Abdul Aziz J (now JCA) in *Sakinas Sdn Bhd v. Siew Yik Hau & Anor* [2002] 3 CLJ 275 interpreted s. 56(3) of the Contracts Act 1950 in this way (see pp. 288-289 of the report):

> In my opinion, the words 'at any time other than that agreed' do not refer to the act of accepting performance of the promise, but refer to the performance of the promise itself. The words 'If … the promisee accepts performance of the promise at any time other than that agreed' do not mean that performance has been delayed but is now completed and the promisee now, at a time later than the agreed time, accepts the performance. If that were so, and the promisee now gives notice of intention to claim compensation, the notice cannot be of any practical use to the promisor, except to enable him to know in advance that there will be a claim against him and he had better get ready with the money to pay his lawyers, and the promisee, if the promisee should succeed, which I do not think is the intended purpose of the notice. The phrase really means, in my opinion, the promisee accepting, meaning agreeing, that the promisor who has been in breach as to time may perform his promise at some other time, which has to be a time later than the time of the promisee's so agreeing. At the time of the promisee's so agreeing, the performance has not been completed yet. The promisee says, 'It's all right. Although the contract is now voidable because of your delay, I will not void it. You may complete it later, on such and such a date'. At the time that he says so, the promisee, if he wants to claim compensation for the delay, must give notice of his intention to claim compensation, otherwise the promisor is entitled to assume that he will not be liable to any compensation. The notice is important as it will enable him to come to a commercial decision whether it is viable for him to go on performing if he is going to have to pay compensation.

It seems to me that the case of *Sakinas Sdn Bhd v. Siew Yik Hau & Anor (supra)* also lays down the principle that the notice is to be given when the promisee expressly affirms the contract. In sharp contrast would be the case of *Hindustan Construction Company v. The State of Bihar (supra)* where there was no necessity for such a requirement because unless expressly terminated, the contract was said to continue to subsist. There was no question of a positive act required on the part of the promisee to affirm the contract and to that extent *Sakinas* differed from *Hindustan Construction Company*.

Still relying on *Sakinas*, it was pointed out that in that case his Lordship Abdul Aziz J (now JCA) had held that the failure to give notice of intention to claim compensation at that time would entitle the promisor to assume that he will not be liable to pay any compensation. His Lordship was of the view that the notice was crucial as "it will enable him (the promisor) to come to a commercial decision whether it is viable for him to go on performing if he is going to have to pay compensation." Using this passage as a leverage, it was submitted on behalf of the defendant that s. 56(3) of the Contracts Act 1950 would operate to bar the plaintiffs from any claim for liquidated ascertained damages by reason of the plaintiffs' failure to give the requisite notices at the expiry of the original completion dates or so soon thereafter, that would be at the point of time when the right to rescission arose.

To buttress the defendant's stand that s. 56(3) of the Contracts Act 1950 would aid the defendant in warding off the claim for liquidated ascertained damages it was argued that since the sale and purchase agreements were in accordance with Schedule "H" to the Housing Developers (Control and Licensing) Regulations 1989 which were in turn made under the Housing Developers (Control and Licensing) Act 1966, then that sale and purchase agreements took on a legal nature similar to that of a piece of subsidiary legislation akin to the Housing Developers (Control and Licensing) Regulations 1989. Being a piece of subsidiary legislation, it was argued that the sale and purchase agreements governing the parties cannot override the general application of the Contracts Act 1950. It was emphasised that the provisions of the Contracts Act 1950 being a Federal law must necessarily prevail and override the subsidiary legislation. My attention was drawn to s. 87(d) of the Interpretation Acts 1948 and 1967 which enacts as follows:

> When an (Act of Parliament,) Ordinance or Enactment confers power on any authority to make subsidiary legislation, the following provisions shall, unless the contrary intention appears, have effect with reference to the making and operation of such subsidiary legislation:
>
> (d) no subsidiary legislation made under an Act of Parliament or Ordinance shall be inconsistent with any [Act of Parliament or] Ordinance, and no subsidiary legislation made under a State … Enactment shall be inconsistent with any Act of Parliament or Ordinance or Enactment.

and it was argued that this provision falls within Part II of the Interpretation Acts 1948 and 1967, which by virtue of s. 65 thereof, applies to the Housing Developers (Control and Licensing) Act 1966 and the Housing Developers (Control and Licensing) Regulations 1989. All these arguments were highlighted by Mr. Michael K.T. Chow to show that the sale and purchase agreements which bind the parties must not override and must be read in the context of the Contracts Act 1950. Put differently, it was submitted that being a subsidiary legislation the sale and purchase agreements cannot override and must be subservient to the Contracts Act 1950. In a textbook entitled *"Statutory Interpretation", "A Code"*, 3rd edn by FAR Bennion at p. 174, the following passage appears:

> **Must not conflict with law** Unless the enabling Act so provides, delegated legislation cannot override any Act – and certainly not the enabling Act itself (*Re Davis, ex p Davis* [1872] 7 Ch App 526 at 529). Indeed it is taken not to be impliedly authorised to override any rule of the general law (5 Co Rep 63a; *Hall v. Nixon* [1875] LR 10 QB 152 at 159; *Rossi v. Edinburgh Corpn* [1905] AC 21. See further Code s. 58).

And applying this passage it was argued that the subsidiary legislation like the Housing Developers (Control and Licensing) Regulations 1989 was not only prohibited from expressly conflicting or overriding the application of the general law such as the Contracts Act 1950 but it was further forbidden to even impliedly override the same. It was further argued that even if cls. 22(1) and 24(1) of the sale and purchase agreements were applicable to allow compensation in the form of liquidated damages, these clauses must be read with the provisions of the Contracts Act 1950 especially s. 56(3) thereof. In other words, it was pointed out that the plaintiffs must give the requisite notices of their intentions to claim liquidated damages at the expiry of the original completion dates.

Mr. NV Sree Harry, the learned counsel for the plaintiffs, quite rightly argued that this was a case where there was a blatant breach of the sale and purchase agreements by the defendant in not completing the common facilities and in not delivering vacant possession of the condominium units to the plaintiffs within the thirty six (36) months and that this state of affairs was still continuing. Mr. NV Sree Harry also pointed out that although it was open to the defendant as the developer under the Housing Developers (Control and Licensing) Regulations, 1989 to try and persuade the Controller of Housing to vary the date of delivery of vacant possession or even to vary the date of completion of the common facilities, yet the defendant as the developer made no attempts to do so. He further submitted that the purchasers' claims – referring to the plaintiffs, were essentially for liquidated damages based on the standard sale and purchase agreements as found in Schedule "H" of the Housing Developers (Control and Licensing) Regulations 1989.

To me, the legal stand adopted by the defendant was this. That the plaintiffs as the purchasers cannot claim compensations for late delivery because at the expiry of the original completion dates, the plaintiffs did not give to the defendant the requisite notices of their intentions to claim compensations pursuant to s. 56(3) of the Contracts Act 1950. But the plaintiffs through Mr. NV Sree Harry submitted that s. 56(3) of the Contracts Act 1950 did not apply to the plaintiffs because as the purchasers the plaintiffs did not indicate to the defendant when the contracts became voidable on the original completion dates, or so soon thereafter, that it was acceptable to the plaintiffs if the defendant fulfilled their promise at some other time. For his interpretation of s. 56(3) of the Contracts Act 1950, Mr. NV Sree Harry relied on the case of *Sakinas (supra)* in particular to the passages that were reproduced earlier as seen at p. 513 of the MLJ reporting and he too relied on the following passage at the same page in the judgment of Abdul Aziz J (now JCA) in *Sakinas*:

> In my opinion, sub-s. (3) does not apply to the respondents unless when the contract became voidable on 13 December 1997, or soon after that, they indicated to the appellants that it was acceptable to them if the appellants fulfilled their promise at some other time. There is no evidence as to that.

Flowing from that it was strenuously argued by Mr. NV Sree Harry that just like the *Sakinas*' case, the present case too would bring it outside the scope of s. 56(3) of the Contracts Act 1950 because the plaintiffs did not indicate to the defendant when the contracts became voidable on the original completion dates, or so soon thereafter, that it was acceptable to the plaintiffs if the defendant fulfilled their promise at some other time. There was no evidence here that the plaintiffs did that.

It is pertinent to note that the facts in *Sakinas* are on all fours with the facts of the present case. In that case, the purchaser brought an action against the developer for liquidated damages when the developer failed to hand over vacant possession of the apartment and to complete the common facilities in time and the developer, just like the present case, attempted to defeat the purchaser's claim for liquidated damages by contending that since the purchaser did not give the developer notice of their intention to claim compensation for late delivery pursuant to s. 56(3) of the Contracts Act 1950, the purchaser was not entitled to receive the compensation.

It must be borne in mind that the Housing Developers (Control and Licensing) Act 1966 is a specific piece of social legislation to protect house buyers or purchasers from unscrupulous developers. This was the thinking of the then Federal Court (Suffian LP, Syed Othman & Abdul Hamid FCJJ) in the case of *S.E.A. Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] 2 MLJ 31, where Suffian LP speaking for the then Federal Court aptly said at p. 34 of the report:

> It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act.

This approach was also echoed by VC George J in *Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 335 where his Lordship said at p. 341 of the report:

> The scheme of the Housing Developers (Control and Licensing) Act 1966 and of the Rules of 1970 is to provide a measure of protection to purchasers of housing accommodation in a housing development against unscrupulous developers.

The same sentiments were shared by the then Federal Court (Lee Hun Hoe CJ (Borneo), Mohamed Azmi & Abdoolcader FCJJ) in *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 CLJ 131; ([1985] CLJ (Rep) 77), when Mohamed Azmi FCJ delivering the judgment of the then Federal Court said at p. 139 (p. 84) of the report:

> The attempt of the appellants to contract out of the Act is clearly not a device which can be described as legitimate. It is an open defiance of the Housing Developers legislation. Having regard to the policy and objective of Housing Developers Act 1966 and the 1970 Rules made thereunder the protection afforded by this legislation to house buyers is not merely a private right but a matter of public interest which Parliament has intended to protect from being bargained away or renounced in advance by an individual purchaser (see the principle enunciated by the House of Lords in *Johnson v. Moreton* [1978] 3 All ER 37, 56 and applied by this court in *S.E.A. Housing Corporation v. Lee Poh Choo* [1982] 2 MLJ 31, 34).

and by the Privy Council (Lord Keith of Kinkel, Lord Fraser of Tulleybelton, Lord Templeman, Lord Ackner & Sir Robert Megarry) in the same case when it went up on appeal *vide City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69, where Lord Templeman delivering the judgment of the Board said at p. 71 of the report:

> This argument makes nonsense of an Act which is clearly designed to protect purchasers from developers, and those purchasers need protection whether the sites of houses are sold before or contemporaneously with or after completion of the houses.

In 1995, in the case of *Xavier Kang Yoon Mook v. Insun Development Sdn Bhd* [1995] 2 CLJ 471, I had occasion to say as follows at pp. 476-477:

> In making the Housing Developers (Control and Licensing) Regulations 1982, the Minister must have thought of the plight of the poor prospective house buyers who are at the mercy of the cunning and rich developers. The language employed in cl. 18(2) of the S & P agreement is clear and unambiguous, and its natural meaning relates to the right of the purchaser plaintiff to rescind and to sue immediately for liquidated damages if the recalcitrant developer fails to deliver the said house within 24 months from the date of the S & P agreement. In construing cl. 18(2) of the S & P agreement, one must examine the language employed therein, and one must not be influenced by other unnecessary considerations. As Lord Herschell said in *Bank of England v. Vagliano Brothers* [1891] AC 107 at pp. 144-145; [1891-4] All ER 93 at p. 113:

> … I think the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated.

Though Lord Hershell was dealing with the language of the statute in that case, his germane observations apply equally in construing the words of the standard S & P agreement as found in Sch E of the Housing Developers (Control and Licensing) Regulations 1982.

For the reasons adumbrated above, I ordered that the defendant shall pay immediately to the plaintiff liquidated damages calculated from day to day at the rate of 10% pa of the purchase price of RM27,680 commencing from 18 August 1988 (the date of vacant possession) to 5 June 1994 (the date of termination of the S & P agreement). Costs should rightly go to the plaintiff.

Now, the supervisory roles of the Minister and his officials to protect the interests of the purchasers can readily be seen in s. 11 of the Housing Developers (Control and Licensing) Act 1966 where that section gives the power to the Minister to give directions under s. 12 thereof for the purpose of safeguarding the interests of the purchasers where the licensed developers are unable to meet its obligations to its purchasers. The general scheme and theme of safeguarding the interests of the purchasers being of paramount importance can also be seen in s. 24 of the Housing Developers (Control and Licensing) Act 1966 and that section, in no uncertain terms, gives the power to the Minister to prescribe the form of the standard sale and purchase agreement in order to put into motion and carry into effect the purpose of the said Act. For convenience, the relevant parts of s. 24 of the Housing Developers (Control and Licensing) Act 1966 are now reproduced:

24. Powers to make regulations.

(1) Subject to this section, the Minister may make regulations for the purpose of carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, the regulations may:

(c) prescribe the form or forms of contracts which shall be used by a licensed housing developer, his agent, nominee or purchaser both as a condition of the grant of a licence under this Act or otherwise.

It would be correct to say and I so say that the Contracts Act 1950 is a piece of legislation of a general nature setting out the general law governing contracts between the parties, in general. Whereas the Housing Developers (Control and Licensing) Act 1966 was enacted to "provide for the control and licensing of the business of housing development in West Malaysia and for matters connected therewith" – in short, it is a piece of specific legislation governing the sale of houses by a licensed developer. The plaintiffs' claims for liquidated ascertained damages were not based on the general contract but rather on the standard sale and purchase agreements as set out in accordance with Schedule "H" to the Housing Developers (Control and Licensing) Regulations 1989 which were made under the Housing Developers (Control and Licensing) Act 1966. Seen in its correct perspective, the present case was a tussle between the specific law and the general law. On the need to accord precedence to a specific provision, I had occasion to say in *Folin & Brothers Sdn Bhd v. Wong Foh Ling & Wong Swee Lin & Ors* [2001] 1 CLJ 604 especially at p. 622 to p. 623 of the report, the following:

> In my judgment, the specific provision must necessarily take precedent over the general provision. I am fortified in my view by certain passages that appeared in the judgments of other learned judges in the following cases:
>
> (1) In *Barker v. Edger & Ors* [1898] AC 748 PO at p. 754, Lord Hobhouse had this to say:
>
> > The general maxim is, *Generalia specialibus non derogant*. When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and on its own terms. This case is a peculiarly strong one for the application of the general maxim.
>
> (2) In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 2 CLJ 713 (CA), Gopal Sri Ram JCA delivering the judgment of the Court of Appeal at p. 743 remarked that:
>
> > There is another compelling reason for holding that the respondents have no caveatable interest in the land. It lies in the rule of construction expressed in the maxim *generalibus specialia derogant.* Where there are two provisions of written law, one general and the other specific, then, whether or not these two provisions are to be found in the same or different statutes, the special or specific provision excludes the operation of the general provision.

Thus in *Commissioner of Income Tax v. Shahzada Nand & Sons* AIR [1966] SC 1342, where (at p 1347) Subba Rao J said:

> Another rule of construction which is relevant to the present enquiry is expressed in the maxim *generalia specialibus non derogant*, which means that when there is a conflict between a general and a special provision, the latter shall prevail. The said principle has been stated in *Craies on Statute Law* (5th Ed), at p 205, thus:
>
> > The rule is, that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

See also *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285.

The maxim *generalibus specialia derogant* is of universal application and it is very efficacious. In *Re Wong Chong Siong, ex p Arab Malaysian Finance Bhd* [1999] 1 CLJ 222, I reiterated that (see pp. 224-225 of the report):

> The maxim *generalibus specialia derogant* is a popular terminology for interpretation and it has been used by judges in Commonwealth countries. Reference to some of these judgments would be fruitful. Thus, Griffiths CJ in *Goodwin v. Phillips* [1908] 7 CLR 1 said at p. 7 of the report:
>
> > … where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are expected or their operation is excluded with respect to cases falling within the provisions of the later Act.
>
> In *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285, Raja Azlan Shah CJ (Malaya) (as His Majesty then was) said:
>
> > *Generalibus specialia derogant* is a cardinal principle on interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law.

Earlier on in the same vein, his Lordship Raja Azlan Shah Ag LP (as His Majesty then was) said in *PP v. Chu Beow Hin* [1982] CLJ 110; [1982] CLJ (Rep) 288:

> Where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law – *generalibus specialia derogant.*

Finally, Reilly J in *Corporation of Madras v. Electric Tramways Ltd* AIR [1931] Mad 152 said:

> There is the old maxim *generalia specialibus non derogant*; that is general provisions do not derogate from special provisions. If the legislature makes a special Act dealing with a particular case and later makes a general Act, which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless unless it is clear that in making the general Act the legislature has had the special Act in its mind and has intended to abrogate it, the provisions of the general Act do not override the special Act.
>
> If the special Act is made after the general Act, the position is even simpler. Having made the general Act if the legislature afterwards makes a special Act in conflict with it, we must assume that the legislature had in mind its own general Act when it made the special Act and made the special Act, which is in conflict with the general Act, as an exception to the general Act. These propositions appear to me to be beyond discussion at the present day.

Without a doubt applying that maxim, the Bankruptcy Rules 1969 takes precedence over the RHC.

Likewise here, the sale and purchase agreements made in accordance with Schedule "H" to the Housing Developers (Control and Licensing) Regulations, 1989 which were in turn made under the Housing Developers (Control and Licensing) Act 1966 must take precedence over the Contracts Act 1950. Being a specific piece of social legislation enacted solely to protect house buyers from unscrupulous developers, the standard sale and purchase agreements signed by the plaintiffs must take precedence over the Contracts Act 1950 and must be given effect accordingly. In the words of Lord Simon of Glaisdale in *Stock v. Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 especially at p. 235 to p. 236 of the report:

> In his argument based on alleged anomaly counsel for the appellants was founding himself on the rider in what has come to be known as 'Lord Wensleydale's golden rule' of statutory construction – namely, you are to apply statutory words and phrases according to their natural and ordinary meaning without addition or substraction, unless that meaning produces injustice, absurdity, anomaly or contradiction, in which case you may modify the natural

and ordinary meaning so as to obviate such injustice etc. but no further. (Nowadays we should add to 'natural and ordinary meaning' the words 'in their context and according to the appropriate linguistic register.') Counsel for the appellants urged your Lordships, as he did the Court of Appeal, to modify the natural and ordinary meaning of the statutory language – in effect, to add words which are not in the statute in order to obviate what he claimed were the absurd and anomalous consequences of taking the words literally.

The rider to 'Lord Wensleydale's golden rule' may seem to be at variance with the citations of high authority contained in the speeches of my noble and learned friends. But this is not really so. The clue to their reconciliation is to be found in the frequently cited passage on statutory construction in Lord Blackburn's speech in *River Wear Commissioners v. Adamson* [1877] 2 App. Cas. 743, 763:

> In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view.

Words and phrases of the English language have an extraordinary range of meaning. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know, as exactly as possible, where he stands under the law). The first way, says Lord Blackburn, of eliminating legally irrelevant meanings is to look to the statutory objective. This is the well-known canon of construction referred to by my noble and learned friend on the Woolsack which goes by the name of 'the rule in *Heydon*'s case' [1584] 3 Co. Rep. 7a. (Nowadays we speak of the 'purposive' or 'functional' construction of a statute.).

It is axiomatic that in interpreting the specific piece of social legislation at hand, an interpretation must be arrived at so as to advance the object and purpose of the Housing Developers (Control and Licensing) Act 1966 ("Housing Act"). Full effect must therefore be accorded to the avowed social objective of the Housing Act. It is germane at this juncture to refer to s. 17A of the Interpretation Acts 1948 and 1967 which specifically requires the courts to adopt a purposive approach in construing statutes. That section enacts as follows:

Regard to be had to the purpose of Act.	17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

and using this section as springboards, it was vigorously submitted by Mr. NV Sree Harry for the plaintiffs that it was not the intention of Parliament in enacting the Housing Act to insist that purchasers must give written notices at the original completion dates to the developer before making a claim for liquidated ascertained damages. Mr. NV Sree Harry further submitted that in enacting the Housing Act, Parliament must have thought of the plight of the poor prospective house buyers who are constantly at the mercy of the cunning and rich developers. Indeed his submissions are apt and thought provoking. Of importance to note would be this nagging question: Whether a house purchaser who signs the sale and purchase agreement with the developer under and in accordance with Schedule "H" to the Housing Developers (Control and Licensing) Regulations 1989 that was made under the Housing Act, is obliged to refer to the Contracts Act 1950 before he decides to claim for liquidated ascertained damages against the developer for the non-delivery of vacant possession by the developer at the original completion date? In my judgment, the purchaser is not obliged to refer to the Contracts Act 1950 before he decides to claim for liquidated ascertained damages against the developer for non-delivery of vacant possession at the original completion date. It must be borne in mind that the purchaser of, say a terrace house, is only concerned about the sale and purchase agreement which he has signed with the developer and he will take extra pains to read and understand that agreement. The purchaser would not be concerned with the rigours of the Contracts Act 1950 particularly s. 56(3) thereof. The purchaser is entitled to seek refuge under the Housing Act because in the words of Suffian LP in *S.E.A. Housing Corporation Sdn Bhd v. Lee Poh Choo (supra)* at p. 34:

> Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act.

Put differently, in construing the standard sale and purchase agreements which the plaintiffs have signed with the defendant, one must examine the language employed therein and at the same time bearing in mind the purpose of the Housing Act one must not purport to go around the Housing Act and the Housing Developers (Control and Licensing) Regulations 1989 ("Housing Regulations") so as to remove the protection accorded to the plaintiffs as house-buyers by importing s. 56(3) of the Contracts Act 1950. It would certainly be erroneous in the extreme to burden the plaintiffs as purchasers with the requirement of s. 56(3) of the Contracts Act 1950 when the Housing Act and the Housing Regulations do not impose such a burden. In my judgment, any attempt to impose such a burden will taint and remove the very protection which the Housing Act under which the Housing Regulations were made was enacted for. This certainly cannot be the law of the country. Incidentally, if Parliament intended that the plaintiffs as purchasers must notify

the defendant as developer of the plaintiffs' intention to claim liquidated ascertained damages before making such a claim, then Parliament would have manifested that intention in the standard sale and purchase agreements which the plaintiffs have signed. The fact that there was no such requirement incorporated in the standard sale and purchase agreements showed, on the balance of probabilities, that Parliament had never intended to impose such a burden on the plaintiffs as the purchasers of those condominium units. This conclusion is fortified by the words which Parliament employed in cls. 22(2) and 24(2) of the standard sale and purchase agreements which read, *inter alia*, that "the vendor shall pay immediately to the purchaser liquidated damages." To read and apply s. 56(3) of the Contracts Act 1950 into a claim for liquidated ascertained damages that was guaranteed under the Housing Act wherein the Housing Regulations were made would only lead to absurdity because it would remove the very protection that Parliament had guaranteed to the plaintiffs as purchasers of the condominium units. It must be borne in mind that although the Housing Act is a piece of social legislation to protect house-buyers generally yet Parliament had nevertheless in enacting the said Act had expressly provided for one provision wherein the developer may be able to escape liability from paying liquidated ascertained damages arising from late delivery. That provision can be found in reg. 11 of the Housing Regulations which stipulates as follows:

11. Contract of sale.

(1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.

(2) No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale.

(3) Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:

Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller.

The word "Controller" is defined under s. 3 of the Housing Act to mean "the Controller of Housing appointed under s. 4". Section 4 of the Housing Act enacts as follows:

> **4. Appointment of Controller, Inspectors and other officers and servants.**
>
> For the purpose of this Act the Minister may appoint an officer to be styled the Controller of Housing and such number of Inspectors of Housing and other officers and servants as the Minister may deem fit.

Thus, it would be apparent that under reg. 11(3) of the Housing Regulations that where the Controller of Housing is satisfied, upon the developer's application, that owing to some special circumstances or hardship, it is impracticable for the developer to strictly comply with certain express provisions of the standard sale and purchase agreement then the Controller of Housing will issue a certificate in writing waiving or modifying such provisions. In the present case, it was certainly open to the defendant as the developer to apply to the Controller of Housing to waive or modify the delivery date but, alas, the defendant developer made no attempt to do so. Perhaps the defendant developer knew that any application to waive or modify such provisions made after the expiry of the time stipulated for the handing over of vacant possession shall not be approved by the Controller of Housing. Here, in the present case, the date for the handing over of vacant possession has long expired. In my judgment, a certificate in writing from the Controller of Housing was the only avenue intended by Parliament for any developer to escape liability for late delivery provided the application to waive or modify such provisions was made before the expiry of the time stipulated for the handing over of vacant possession. In breaking new ground, I am treading cautiously knowing fully well the pitfalls that lie ahead. Housing developers should abide by the standard sale and purchase agreements formulated in Schedule "H" of the Housing Regulations that were made under the Housing Act and should not seek refuge under the Contracts Act 1950 when the going gets tough. By now housing developers must be advised and if not so advised, it is best that they be advised that reg. 11(3) of the Housing Regulations are there for them to utilise wisely. It would not be prudent for this court to accept the defendant's contention by relying on s. 56(3) of the Contracts Act 1950 and allow the defendant to escape liability for the delay in delivering vacant possession of the condominium units. To do so would be tantamount to creating another avenue for the defendant to escape liability for late delivery of vacant possession of the condominium units which Parliament had never intended nor provided for in the Housing Act or the Housing Regulations.

If I am wrong in my approach, I have this to say. Section 56(3) of the Contracts Act 1950 would only apply if and only if the plaintiffs as the purchasers have indicated to the defendant as the developer when the contracts became voidable and that would be on the original completion dates or soon thereafter. Here, there was no evidence whatsoever of any indication by the plaintiffs and for that reason s. 56(3) of the Contracts Act 1950 do not apply. No layman who purchases a property from a developer and who signs the standard sale and purchase agreement just like the present plaintiffs here did would be bothered to cross-check with the Contracts Act 1950 in order to ascertain his legal right to claim for liquidated ascertained damages. In the present case, cls. 22(2) and 24(2) of the sale and purchase agreements certainly give the present plaintiffs as the purchasers of the condominium units the right to sue for liquidated ascertained damages without the need to rescind the sale and purchase agreements. The language employed in cls. 22(2) and 24(2) of the sale and purchase agreements were rather explicit and they are worded in this way:

> Clause 22(2): If the vendor fails to hand over vacant possession of the said parcel, to which water and electricity supply are ready for connection to the said parcel, in time, the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.
>
> Clause 24(2): If the vendor fails to complete the common facilities in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price.

No one can deny that these words are clear and unambiguous and when couched in these terms the plaintiffs as the purchasers of the condominium units have an immediate right to claim for liquidated damages without the need to rescind the sale and purchase agreements. Business efficacy must be given to these words. Commercial effectiveness must be accorded to these sale and purchase agreements. I am asked to imply as a term of the contract that s. 56(3) of the Contracts Act 1950 be read into the sale and purchase agreements entered between the plaintiffs and the defendant. I am to say, however, that it is not sufficient to justify an implication simply because it is reasonable to do so (*Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd* [1918] 1 KB 592 at 605; [1918-1919] All ER Rep 143 per Scrutton LJ, CA; *Peters American Delicacy Co Ltd v. Champion* [1928] 41 CLR 316; 29 SR (NSW) 16; [1928] ALR 317; *Dickstein v. Kanevsky* [1947] VLR 216; *Liverpool City Council v. Irwin* [1977] AC 239; [1976] 2 All ER 39; [1976] 2 WLR

562; *Hospital Products Ltd v. United States Surgical Corp* [1984] 156 CLR 41 at 139; 55 ALR 417; 58 ALJR 587; 1 Aust Const LR 29 per Dawson J; *Lewis v. Bell* [1985] 1 NSWLR 731 at 736 per Mahoney JA, CA (NSW); *Australian Mutual Provident Society v. 400 St Kilda Road Pty Ltd* [1991] 2 VR 417 at 418 per Murphy J; and *Hughes v. Western Australian Cricket Assn (Inc)* [1986] 19 FCR 10; 69 ALR 660 at 711 per Toohey J). I am also to say that it is essential that any term that is sought to be implied must operate reasonably and equitably between the parties. Here obviously for the reasons alluded to by me, to imply s. 56(3) of the Contracts Act 1950 into the sale and purchase agreements in order to shackle the plaintiffs and benefit the defendant cannot be said to be reasonable and equitable between the parties. In my judgment, an unreasonable or inequitable term will and shall not be implied by this court. This approach was also adopted by other courts in other jurisdictions. Thus, in *Sun Alliance Pensions Life & Investments Services Ltd v. RJL* [1991] 2 Lloyds Rep 410, QB, the court there held that because the insurance company had an unfettered right to reject proposals for insurance it would have been unreasonable to imply a term that the company would not reject proposals without reasonable grounds. In *Prime Holdings Pty Ltd v. Kanemary* [1992] 7 WAR 308; 23 ATR 108, the court there was of the view that it would have been unreasonable to imply a term into the sale of land contract that the purchaser would have an open-ended right of termination for any reason which appeared good to the purchaser. In *GSA Group Pty Ltd v. Siebe Plc* [1993] 30 NSWLR 573 at 581 where the court after taking into account the history of the parties negotiations held that the implied term that the price of goods would be a reasonable price was unreasonable.

All said and done, it was part and parcel of my judgment that the sale and purchase agreements between the parties were commercially effective without the need to imply s. 56(3) of the Contracts Act 1950 into it (*Bell v. Lever Bros Ltd* [1932] AC 161 at 226 per Lord Atkin; *Heimann v. Commonwealth* [1938] 38 SR (NSW) 691 at 695; 55 WN (NSW) 235 per Jordan CJ; *Blacktown Municipal Council v. Doneo* [1971] 1 NSWLR 157 at 161 per Taylor AJA; *Wasson v. Commercial and General Acceptance Ltd* [1985] 2 NSWLR 206 which was affirmed in *Federation Insurance Ltd v. Wasson* [1987] 163 CLR 303, 72 ALR 567, 5 MVR 289; *Australian Meat Industry Employees' Union v. Frugalis Pty Ltd* [1990] 2 Qd R 201 at 206 at 206-207, [1989] 30 IR 149 per Thomas J, with whom Macrossan CJ and Lee J agreed; *David Leahey (Aust) Pty Ltd v. McPherson's Ltd* [1991] 2 VR 367 at 375 per Tadgell J; *Ian Delbridge Pty Ltd v. Warrandyte High School Council* [1991] 2 VR 545 at 558, [1990] 10 Aust Const LR 17 per Murphy J; and *Hughes v. Greenwich London Borough Council* [1994] 1 AC 170 at 177, [1993] 4 All ER 577, [1993] 3 WLR 821 at 827-828 per Lord Lowry). It was certainly not obvious to the parties that at the time of entry into the sale

and purchase agreements, s. 56(3) of the Contracts Act 1950 would be implied into it *(Luxor (Eastbourne) Ltd v. Cooper* [1941] AC 108, [1941] 1 All ER 33; *Hughes v. Western Australian Cricket Assn (Inc)* [1986] 19 FCR 10, 69 ALR 660 at 711; and *Himbleton Pty Ltd v. Kumagai (NSW) Pty Ltd* [1991] 29 NSWLR 44 at 59-62). Three more authorities would be referred to. It would be as follows. In *Buche v. Box Pty Ltd* [1993] 31 NSWLR 368 at 375, the court there held that an alleged implied term in the articles of company was not obvious. In *Nutting v. Baldwin* [1995] 2 All ER 321, [1995] 1 WLR 201 at 211 per Ratee J, it was held that there was no implied term that the committee should have absolute discretion in exercising its powers where the term was not an obvious implication. In *Ashmore v. Corp of Lloyd's (No. 2)* [1992] 2 Lloyds Rep 620, the court there held that the terms that were sought to be implied into the contracts regulating the management of underwriting syndicates were said to be too complex to be obvious.

I must now proceed further.

Reverting to the question of the applicability of the general legislation in the form of the Contracts Act 1950, it was certainly erroneous to argue that the specific legislations in the forms of the Housing Act and the Housing Regulations would only exclude or in certain instances repeal the general legislation provided the general legislation came into being subsequent to the specific legislations. The law would be best summarised in this way. Where there are two provisions of the written law, one general and the other specific, then whether or not the specific legislation came into existence subsequent to the general legislation or *vice versa*, the specific legislation or the special provision in the specific legislation will exclude the operation of the general legislation. This proposition of the law can be seen in the speech of Raja Azlan Shah CJ (Malaya) in *Public Prosecutor v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285 FC where His Royal Highness aptly said:

> Now, the Criminal Procedure Code (F.M.S. Cap. 6) which came into force on 1.1.1927 is an enactment regulating criminal proceedings in general in the former Federated Malay States. It was amended and extended throughout Malaysia by the Criminal Procedure Code (Amendment and Extension) Act, 1976 on 10.1.1976. It cannot be gainsaid that it is a written law within the meaning assigned in section 2 of the Interpretation Act 1967.
>
> The Dangerous Drugs Act 1952 (Revised – 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, *inter alia*, dangerous drugs, and 'to make special provisions relating to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith'. In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular

a that section 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (Act A426) and became operative on 10.3.1978. *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. (See also *Public Prosecutor v. Chu Beow Hin* [1982] CLJ 110; [1982] CLJ (Rep) 288). The provisions of section 3 of the Criminal Procedure Code which counsel for the respondent seeks to rely on has no relevance whatsoever to the matter in issue before us.

b

And the law has since remained the same. Thus, it would be appropriate to refer to the specific legislations, namely, the Housing Act and the Housing Regulations in adjudicating enclosure one (1) without the need to refer to the general legislation in the form of the Contracts Act 1950.

c

It was argued on behalf of the defendant that the standard sale and purchase agreements as seen in Schedule "H" of the Housing Regulations were nothing more than mere contractual documents and that being the case it was further argued that the normal rules of construction would apply in construing such contractual documents. Now, taking these arguments in its correct perspective and to its logical conclusion, it must be emphasised that the word "immediately" that appears in both cll. 22(2) and 24(2) of the sale and purchase agreements which have been reproduced earlier would mean that the purchasers have the right to claim the liquidated ascertained damages without giving the requisite notices to the defendant under s. 56(3) of the Contracts Act 1950. Being contractual documents, there can be little or no argument at all that the defendant as the developer had agreed to waive their right in respect of the notification requirement under s. 56(3) of the Contracts Act 1950. This was my judgment and I so hold accordingly.

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I reiterate, as a matter of course, that this judgment do not affect the eighth (8th) plaintiff at all because he has decided not to pursue with the originating summons in enclosure one (1).

g

For the reasons adumbrated above, I must allow enclosure one (1) with costs. I did just that.

h

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